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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-773

STATE OF TENNESSEE,

Petitioner,

vs.

SAM PILKEY,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE

RESPONSE TO PETITION

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RESPONSE TO PETITION

The respondent, Sam Pilkey, respectfully submits this response to the petition for writ of certiorari by the petitioner, State of Tennessee.

QUESTION PRESENTED

Does the availability of in-court cross-examination satisfy the Sixth Amendment right of confrontation?

ARGUMENT

The Respondent, Sam Pilkey, submits that the availability of in-court cross-examination does not satisfy the requirements of the Sixth Amendment Confrontation Clause in the context of this case. The State of Tennessee in following its statutory procedure of showing the ex parte videotaped statement to the jury and allowing the Respondent, Sam Pilkey, to call the five-year-old child as a witness is placing the Respondent in an untenable position, unequaled in the history of Anglo-American jurisprudence; i.e. the defendant being forced to call his chief accuser as a witness, in order to exercise his basic right of cross-examination. This procedure results in a "damned if you do", or "damned if you don't" choice for the Respondent. Since the jury was told of the availablity of the child as a witness, the impression left in the jurors' minds is that the Respondent, Sam Pilkey, had nothing to gain by calling the child as a witness, or in the alternative, was fearful of the child's expected testimony. The Respondent could hope to attack the child's credibility and memory, in the same way you would any other witness; however, by exercising this right, the Respondent was also plagued with the possibility of the child testifying about additional incriminating facts which were not present in the ex parte videotaped statement; or the converse--the child's testimony being less incriminating than the ex parte videotaped statement, which would still leave the previous ex parte

videotaped statement "indelibly imprinted" in the juror's minds. There would be no way of removing that impression, other than by cross-examining the ex parte videotape statement which would not be possible.

Ohio v. Roberts 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 597 (1980) and California v. Green 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 489 (1970) support the proposition that if the witness is available, irrespective of the reliability of prior testimony, the confrontation clause requires the physical presence of the accuser. If the Respondent, Sam Pilkey, exercised his right to call his chief accuser as a witness, then theoretically, the jury could hear the same evidence twice, which would have a chilling effect on the Respondent's decision to exercise his right of confrontation. Neither the Respondent in this case, nor any defendant in a criminal trial should be forced to call his chief accuser to the stand as a witness to exercise his right of cross-examination. All of the attendent problems concerning this issue are magnified by the child's age--five years old. Serious questions remain as to whether the child can be competently cross-examined at that age. The child may be able to say enough words to establish the elements of the offense; i.e. penetration; however, it does not automatically follow that the child could be a competent witness. If the Petitioner, State of Tennessee, had called the child as its witness, then the child's competency could be predetermined before the jury heard any testimony from the child. Implicit in the right

of confrontation is the presumption of competency of the witness. If a witness, because of tender years, is not competent, then there cannot be effective cross-examination. The Respondent, Sam Pilkey, should not have to risk his right of cross-examination against the questionable competency of a five-year-old witness. If the Petitioner, State of Tennessee, were required to call the child as a witness, then competency could be predetermined and the defendant would have the opportunity to observe the witness' demeanor and credibility and then make an informed decision as to whether to cross-examine the child or not. In the context of the present case, the Respondent did not have the opportunity to observe the demeanor of the child prior to exercising his right of cross-examination, and therefore was deprived of his ability to make an intelligent choice with the advice of counsel.

CONCLUSION

For the foregoing reasons, the Respondent, Sam Pilkey, submits that the petition for writ of certiorari should be granted and the conviction reversed because of a violation of Respondent's Sixth Amendment Right of Confrontation as contained in petition No. 89-6006.

Respectfully submitted,

GLENNA M. RAMER

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

AFFIDAVIT OF CERTIFICATE OF SERVICE

I, GLENNA M. RAMER, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States.

I certify that on this 19th day of February, 1990, I deposited ten (10) copies of this Response to Petition for Writ of Certiorari by Federal Express, delivery prepaid, properly addressed to the Clerk of this Court; and that I deposited one (1) copy of this Response to Petition for writ of certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to Jerry L. Smith, 450 James Robertson Parkway, Nashville, Tennessee 37219.

I further certify that all parties required to be served have been served.

GLENNA M. RAMER

Sworn to and subscribed before me
this 19th day of February, 1990.

NOTARY PUBLIC

My Commission Expires: 11/2/93